No. 16,250

United States Court of Appeals

For the Ninth Circuit

BERNARD G. HOUSE,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

Appeal from the District Court for the District of Alaska, Fourth Division

BRIEF OF APPELLANT

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JURISDICTIONAL STATEMENT

The District Court had jurisdiction of this case by virtue of the provisions of Title 53, Chapter 2, Alaska Compiled Laws Annotated 1949 and 48 USC 101 and 193. This Court acquired, prior to January 3, 1959—and therefore now has—jurisdiction pursuant to 28 USC 1291 which then provided[1] that the courts of appeals shall have jurisdiction of appeals from all

[1]Public Law 85-508, approved July 7, 1958, effective upon the admission of Alaska into the Union (January 3, 1959), eliminated the provisions which gave this Court jurisdiction of appeals from the District Court for the Territory of Alaska and established a United States District Court for the State of Alaska. The Act continues in effect the appellate jurisdiction of this Court, once acquired.

final decisions of the district courts of the United States, the District Court for the Territory of Alaska, etc., except where a direct review may be had to the Supreme Court; and 48 USC 1294 which designates this Court as the appropriate court for appeals from such judgments in the District Court for the District of Alaska.

STATEMENT OF THE CASE

Appellant House was indicted on November 7, 1957, at Fairbanks, Alaska, for the crime of first degree murder.[2] The grand jury charged in the indictment that on the 21st day of May, 1957 House "being of sound memory and discretion, did purposely and of deliberate and premeditated malice kill Jack Perry by shooting him with a shotgun, in violation of Section 65-4-1 of the Alaska Compiled Laws Annotated, 1949."[3] He was tried in the District Court for the District of Alaska, Fourth Judicial Division, by a jury and on May 9, 1957 was found guilty of murder in the first degree.[4] A timely motion was made for a new trial, assigning as error, *inter alia,* certain jury instructions and the failure of the trial court to give certain other instructions requested by the defendant

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[2]Tr. 1.

[3]Sec. 65-4-1. *First degree murder.* That whoever, being of sound memory and discretion, purposely, and either of deliberate and premeditated malice or by means of poison, or in perpetrating or in attempting to perpetrate, any rape, arson, robbery, or burglary, kills another, is guilty of murder in the first degree, and shall be sentenced to imprisonment at hard labor for life or for any term of years." As amended March 30, 1957.

[4]Tr. 26, 494.

(appellant herein).[5] Timely objection had been made previously with respect to the giving and refusal, respectively, of such instructions.[6] The motion for a new trial was fully briefed and argued[7] and on June 7, 1958 was denied.[8] On June 7, 1958, there was entered a judgment and commitment in this case, whereby the appellant was sentenced to imprisonment for a period for and during the term of his natural life.[9] On the same day he filed his notice of appeal to this Court.[10] On September 1, 1959, this Court granted leave to appellant to dispense with the printing of the record on appeal in this case and to proceed on typewritten record for review.[11] The typewritten record consisting of three volumes and containing 495 pages was filed on November 30, 1959. This brief is filed on behalf of the appellant pursuant to enlargement of time heretofore granted by this Honorable Court.

STATEMENT OF THE FACTS

The scene of the human drama with which this case is concerned is Fairbanks, Alaska, a mushrooming settlement of approximately 25,000 (including surrounding areas), still partly a pioneering, rugged mining center and partly a defense boomtown. Here one

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[5]Tr. 67-69.

[6]Tr. 25, 481-494. Defendant's requested instructions are set forth at pp. 28-34 of the transcript.

[7]Tr. 70, 77.

[8]Tr. 78-79.

[9]Tr. 81.

[10]Tr. 80.

[11]Tr. 100.

finds numerous log cabins spotted among more pretentious homes. Goldmining is actively carried on and oil fields are being developed to the North.[12] Ringing the city are two large military establishments, Eielson Air Force Base and Ladd Air Force Base, from whose confines emerge, weekly, large numbers of lonely, diversion-bent servicemen, seeking to escape the bleakness and barrenness of their surroundings and daily routine, in the many honky-tonks on the outskirts of the city, where sawdust floor covering, "B-girl" hostesses (and worse) and more or less open gambling are quite prevalent, despite occasional attempts by military and civilian law enforcement agencies to "clean up" the town.

The time is the late arriving arctic spring season, which follows the long awaited "break-up" of the ice on the nearby Tanana and Chena Rivers, the former itself being the occasion for a time honored—if quite illegal—Alaskan custom of widespread popular participation in a gambling event, the so-called Nenana "ice classic." The fever of this quasi-public lottery affects young and old, drifters and stable residents; its tickets are on sale at every drugstore, sporting goods shop and what have you and news of its progress dominates the newspaper headlines as surely as the World Series or summit conferences. It is at breakup time, that bustling, lusty Fairbanks explodes from the bondage in which darkness and arctic chills have held it enthralled for many months:

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[12]See Guide to Alaska and the Yukon (6th edition), pp. 121-125 (published by Guide to Alaska Co. of Juneau, Alaska).

"Perhaps nowhere else in the whole * * * of Alaska is the contrast between summer and winter so marked as in this bustling city (of Fairbanks), 120 miles South of the Arctic Circle. During the long summer days, when the temperature frequently rises to 90 degrees in the shade and the nights are brief intervals of twilight between sunset and dawn, a kind of fever seizes the citizens of Fairbanks. With only 100 days to wrest gold from placer or drift, to raise cabbages, potatoes and hay in the fields, and tomatoes and green vegetables in the greenhouses, to make new strikes or to develop old ones, to supply the vast expanse of the interior with transportation, household goods, mining equipment, and technical direction, everybody works most of the daylight hours. * * *

"As winter comes on and the nights grow longer, the air becomes breathlessly still and the thermometer drops to the bottom of the tube. The light snow remains poised on telephone lines and bare branches of trees in motionless bands inches high, unshaken by a breath of wind. Deep tracks are worn to woodpiles outside the door, the stove glows red in the early afternoon twilight, and under the lamp grown men pour over treatises on mining and agriculture to make a passing mark in their courses at the University of Alaska. * * * Kerosene freezes thick and white, and dogs learn to turn aside when patted to avoid the tingle of a spark of static electricity jumping from the human hand to their noses. Mail, freight, and passengers still come in over the Alaska Railroad, planes arrive daily, but the sharp, cold quiet deadens all things, throws the mind in upon itself —until there comes a rush of water in the Chena,

when the ice breaks, and a rush of blood to the head, and spring begins."[13]

The incident involves a frontier style shooting in one of the many rough, crudely furnished bars which dot the Alaska and Richardson Highways[14] leading to and from the city and which feature raw whiskey, "taxi-dance" hostesses,[15] a bit of private (and sometimes not so private) gambling[16] and the rugged companionship of men accustomed to working and drinking hard. At the time of the occurrence, this bar—somewhat pretentiously called the "Esquire Club"[17]—was run jointly by a man named Jack Perry and a woman known as Eva Beree.[17a] The day was May 21, 1957 and the time the early morning hours of the day,[18] but well after the sub-arctic sunup. Here we find Perry tending bar;[19] his "partner" Eva Beree and some of the "hostesses" sitting in booths or circulating among the assembled sundry construction workers, cab drivers and "G.I.'s".[20] One of the female employees has fallen asleep or passed out in a booth and a somewhat heated exchange is taking place between Perry and his female partner as to who is to

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[13]Colby, A Guide to Alaska, Last American Frontier (Pub. by the MacMillan & Company, New York, 1950), pp. 294-295.

[14]Tr. 117, 186.

[15]Tr. 134-135, 456.

[16]Tr. 454, 477.

[17]Tr. 117, 186.

[17a]Tr. 132, 452, 456.

[18]Tr. 129a.

[19]Tr. 134, 187, 390.

[20]Tr. 133-134, 292, 306, 308, 366, 388-389.

take her home.[21] It seems that Perry desires to do so and has taken a loaded automatic pistol from a drawer, which he wishes his helpmate to keep on the alert, while he is departing.[22] Apparently, however, it was decided that Miss Beree is to take the young woman home and so Perry, presumably somewhat miffed and considerably in his cups, returns behind the bar, still carrying the lethal weapon.[23]

While this is going on, two men have been amusing themselves at the bar, one, who is seated, is Dean Scott, also a bar owner[24]—away from his estabment on a "busman's" holiday—the other, Bernard G. House, known around Fairbanks as Johnny House, a construction worker (painter),[25] who is the defendant and appellant in this case, standing up. The two are friends and, as a matter of fact, it was the coincidence of House having spotted Scott's parked car in front of the establishment, while House was returning from hunting birds[26] with a companion (also present, but since deceased prior to trial in a rescue attempt).[27] There is a loaded shotgun lying on the floor of House's parked stationwagon, borrowed from a friend for the purpose of the hunt.[28]

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[21]Tr. 133-134, 195-196, 458-459.
[22]Tr.132, 391-392, 458.
[23]Tr. 133, 135, 416.
[24]Tr. 281.
[25]Tr. 402, 413.
[26]Tr. 415-416, 431.
[27]Tr. 273, 338, 390, 415.
[28]Tr. 443.

Scott had come to the place to discuss its possible purchase with Perry, who apparently desired to leave, for reasons of his own.[29] When House arrived, he and Scott made use of the availability of the ever present cup of dice, handy at the bar, first to "shake for drinks" and soon to gamble for money.[30] It seems this was Johnny House's unlucky night, because soon he had lost all the cash he carried and, apparently becoming quite interested in the contest, he leaves by cab to get some more money from his nearby home and to return to resume the game.[31] While the game continues, several men are either watching or engrossed in their own business, some nearby at the bar drinking,[32] some sitting in the adjoining booths or conversing or dancing with the hostesses.[33]

One little group of airmen from a nearby base, having arrived during the wee hours of the morning,[34] after an extended tour of other drinking establishments,[35] is congregating at the far end of the bar.[36] It may be reasonably assumed that there is a fair din being produced, by the tinkle of the jukebox,[37] the various discussions between Perry, the bartender, and his female companion and employees, the rugged conversations of the drinking patrons, and the shouts of

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[29]Tr. 282.
[30]Tr. 118-119, 187, 283, 310, 339, 417.
[31]Tr. 283-284, 310, 339, 367, 418.
[32]Tr. 119, 188.
[33]Tr. 146, 285, 313, 340.
[34]Tr. 117-118, 129a, 367.
[35]Tr. 129a-132, 163, 193-194.
[36]Tr. 118, 368.
[37]Tr. 155, 285, 313, 340.

pleasure or dismay, as the case may be, of the men throwing dice for money.[38]

No one will ever know for certain what prompted Jack Perry—a man of unstable and violent disposition[39]—at that moment to get into an argument with Scott and House and particularly the latter. Witnesses for the government insist that it was Perry's objection to the gambling and profanity of the players,[40] although they fail to explain why Perry took umbrage at so late a stage in the proceedings, except perhaps that he wished to close down the place.[41] Defense witnesses maintain just as stoutly that the argument arose when Perry, who had on several previous occasions taken the "cut of the house"—a customary semi-voluntary contribution—from the stack of money lying at the bar, helped himself once too often.[42] There is also a hint of a possibility that, already stirred up by alcoholic indignation, he mistook the appellant for someone against whom he had a grudge.[43] In any event, all witnesses agree that in the course of the verbal altercation which followed, Perry brandished his loaded weapon, waved it about and pointed it directly at the appellant House.[44] There is testimony that he pulled the trigger once and when the weapon failed to fire, he re-cocked it, injecting a shell into its

[38]Tr. 135, 341.
[39]Tr. 357-358.
[40]Tr. 119, 139.
[41]Tr. 146, 459, 477.
[42]Tr. 284-285, 314, 368-369, 376, 393, 419.
[43]Tr. 314, 402.
[44]Tr. 119, 138, 188, 198, 286-287, 341, 369, 392-393, 465.

chamber and thereafter continued to point it threateningly at House.[45] While so doing, he first insisted that House sit down and shortly thereafter, that he leave the place.[46] It is fairly uncontroverted, moreover, that he refused House the privilege of picking up the sizable stack of the latter's money then reposing on top of the bar, but forced him to retreat through the entrance door which was promptly bolted.[47]

Both of the two hostile groups of witnesses likewise agree, that almost immediately thereafter House returned, pounding or kicking at the door for admittance[48] and that someone slipped the bolt, causing the door to fly open and House to stride in, carrying his shotgun.[49] The appellant says that he was gone only long enough to walk quickly to his parked car and pick up the shotgun, with the idea uppermost in his mind that he must reclaim his money and if possible, disarm Perry, whom he considered a dangerous madman;[50] that he pushed against the door which was locked and which promptly flew open,[51] that he took a few steps which brought him up against the front of the bar and that there, by the beer cooler,[52] stood Perry, levelling his .45 caliber automatic at House,[53]

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[45]Tr. 287, 314-315, 369, 409, 421, 475-476.
[46]Tr. 119, 136-138, 287, 343, 420.
[47]Tr. 119, 139-140, 288, 303-304, 315, 421.
[48]Tr. 119, 289, 316, 334-335, 374, 393, 399-400, 402, 465.
[49]Tr. 120, 299, 316, 324, 373, 377, 436.
[50]Tr. 422-423, 433-434.
[51]Tr. 422, 434.
[52]Tr. 189, 288, 399.
[53]Tr. 289, 298, 317, 325, 344, 370, 381, 394, 399, 408, 423, 435, 437.

who brought up his gun and fired, hiting Perry in the side as he twisted away, whereupon the bartender fell down and his pistol fell and slid across the floor.[54] The appellant says that in the sudden shock of what had happened, he placed his shotgun on the counter and, clapping his hands to his face, exclaimed "Oh my God, what have I done". He states that he then admonished the crowd, which was in an understandable uproar, to stay put and leave everything unchanged,[55] as he was going to notify the police, which he proceeded to do, by driving to the nearest place with a telephone, another bar, whose owner corroborates appellant's claim that he called law enforcement officers. Appellant then returned to the scene of the shooting.[56]

The version of the government's witnesses differs sharply in some important respects from that of the defense witnesses, as related above. Thus it is claimed that Perry put the automatic pistol into the pocket of his coat after his initial assault upon House and that he never took it out of there, even up to the point where he fell, fatally wounded, to the floor;[57] it is not clearly explained, however, how it found its way out of his pocket to where it was later discovered, cocked and loaded.[58] It is also alleged by the prosecution witnesses, that House cursed and menaced Perry as he retreated towards the door under the threat of Perry's

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[54]Tr. 290, 299, 317, 319, 351-352, 424, 435.
[55]Tr. 290-291, 317, 318, 344, 394, 400, 424.
[56]Tr. 318, 382-385, 394, 400, 424-426.
[57]Tr. 120-121.
[58]Tr. 158-159, 220-221, 229, 232, 239, 302, 476.

weapon;[59] that after the shooting some members of the crowd grabbed the shotgun and placed it on the bar;[60] and an attempt is made to cast some doubt upon House's claim that he notified police and then returned to the scene of the homicide.[61]

All the witnesses agree, however, on some of the most important elements of this unfortunate sequence of events. They are in substantial agreement about the fact of the initial assault by Perry upon House, with a deadly weapon, although they may differ as to what kind of verbal argument initially led to it. They agree that House retreated reluctantly, only to return momentarily, after having armed himself.[62] It is virtually uncontradicted that Perry would not permit House to take his stack of money off the bar, after he had been chased out under the threat of Perry's gun; and that Perry then sought to lock him out of the place and that upon House's knocking to demand admission, somebody let him in. The witnesses concur that the shooting followed almost instantaneously after House's re-entry into the bar;[63] that it caught Perry in the side as he twisted[64] and that Perry's cocked and loaded gun was later found lying on the floor;[65] while House's shotgun was found placed on the counter of the bar.[66] They are fairly unanimous

[59]Tr. 119, 188.
[60]Tr. 123, 165, 409.
[61]Tr. 122, 128-130.
[62]Tr. 110-120, 140, 188, 204, 343.
[63]Tr. 120, 188, 289-290, 324, 370, 375, 393, 399.
[64]Tr. 157-158, 319, 344, 376, 394.
[65]Tr. 158-159, 220-221, 229, 290.
[66]Tr. 219, 230, 233.

with respect to House's immediate outcry of dismay and remorse[67] and the fact that someone must have gone out to call the police and then returned and they can point to no one who did,[68] other than the appellant House.[69]

Thus the crucial issues of fact, upon which the fate of the defendant hung in balance and which the jury was called upon to resolve were these:

1. When House retreated, armed himself and returned, demanding admission, did he then and there decide to return and murder Perry or did he return for the lawful purpose of reclaiming his property and disarming the man who had just committed a felonious assault upon him?

2. After House re-entered the bar, carrying his shotgun, did Perry again assault him with his loaded pistol, thus causing House to fire in self-defense or did House cut down Perry as he fled, seeking cover?

The appellant, in the argument to follow, will seek to show that as to both of these vital issues, with respect to which the jury was charged with the awful duty of ultimate determination of the truth, the jury's minds and powers of deliberation and decision with respect to issues of fact, clearly and entirely within their province, was erroneously and prejudicially fettered and restrained, by instructions given by the trial court, over timely objection. These objectionable instructions contained within them a peremptory reso-

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[67]Tr. 123, 190.
[68]Tr. 129, 190.
[69]Tr. 292, 297.

lution, adverse to the defendant, of both of these all-important issues; and hence they amounted to a judicial mandate to find the defendant guilty of murder. Thus the verdict of the jury, far from constituting the product of free and unhindered deliberation, in a fair and open trial, became an inevitable result and a foregone conclusion, in derogation of the defendant's constitutional rights.

SPECIFICATION OF ERRORS

1. The trial court erred in giving jury instruction No. 12, and particularly that portion which reads " * * if you are convinced by the evidence beyond a reasonable doubt that the defendant re-entered the Esquire Club with the intention of shooting the deceased, you cannot find (sic) that he shot in self-defense. * * *", in that the quoted language misled and unduly restricted the jury on the all-important issue of intent.*

*2. The trial court erred in giving instruction No. 12, and particularly that portion thereof which reads "The assault with a dangerous weapon made upon the defendant by the deceased before the defendant left the Esquire Club had ended * * *", in that the quoted language misled and unduly restricted the jury on the all-important issue of self-defense.*

3. The trial court committed plain error in giving Instruction No. 5, containing language which obliterated the important distinction between a deliberate, premeditated murder and an impulsive killing.

4. The trial court, in giving Instruction No. 15, further confused and misled the jury on the vital element of intent.

5. The trial court erred in refusing to give defendant's requested Instructions Nos. 3, 4, 5, 6, 11, and 12.

6. The trial court abused its discretion in failing to grant a new trial after being fully apprised of the foregoing errors in its jury instructions.

7. By unduly restricting the exercise of the jury's fact finding functions on the all-important issues of intent and self-defense, the trial court deprived the accused of his constitutional rights under Article 3 of the United States Constitution and the Fifth and Sixth Amendments thereto.

ARGUMENT

I. IN INSTRUCTING THE JURY THAT, IF IT SHOULD BE CONVINCED THAT THE DEFENDANT RE-ENTERED THE PREMISES WITH THE INTENTION OF SHOOTING THE DECEASED, IT "CANNOT FIND THAT HE SHOT IN SELF-DEFENSE", THE TRIAL COURT IMPROPERLY INVADED THE PROVINCE OF THE JURY AND PREJUDICIALLY FORECLOSED A FINDING OF FACT, FAVORABLE TO THE DEFENDANT, TO THE EFFECT THAT HE DID ACT IN SELF-DEFENSE, WHEN, UPON RE-ENTERING THE PREMISES, HE WAS FACED WITH A NEW ASSAULT WITH A DEADLY WEAPON WHICH THREATENED HIS LIFE. THE QUOTED LANGUAGE FURTHER MISLED THE JURY IN THAT, BY IMPLICATION, IT PRECLUDED AND PREVENTED A FINDING OF FACT, FAVORABLE TO DEFENDANT, TO THE EFFECT THAT WHILE HE RETURNED TO THE PREMISES WITH THE INTENTION OF SHOOTING THE DECEASED, SUCH INTENTION WAS BASED UPON THE EXPECTATION AND APPREHENSION THAT THE DECEASED WOULD RENEW HIS FELONIOUS ASSAULT UPON THE DEFENDANT, THEREBY ENDANGERING HIS LIFE, AND THAT THE SHOOTING WOULD THEREFORE BE NECESSARY IN SELF-DEFENSE.

In a criminal case, the court's instructions should cover every issue or theory having any support in the evidence.

Stevenson v. United States (1896), 162 U.S. 313, 16 S.Ct. 839, 40 L.ed. 980

Where there is any evidence tending, in an appreciable degree, to support a particular theory of a case, the court may give to the jury instructions presenting it to them and the defendant is entitled to have charges given, if there is any evidence as a foundation therefor and regardless of the weakness, insufficiency, inconsistency or doubtful credibility of the proof, and so long as the testimony is not unreasonable or stamped with improbability, he is entitled to have the theory which it embodies presented to the jury with appro-

priate instructions. All doubts in this respect, must be resolved in favor of the defendant.

State v. Grugin (Mo., 1898), 47 S.W.1058, 42 LRA 774, 71 Am.St.Rep. 553

State v. Legg (W.Va.1906), 53 S.E.545, 549, 3 LRA(NS) 1152

Specifically, where there is evidence tending to indicate that the defendant may have acted in self-defense or in the defense of another in taking the life of the deceased, it is the duty of the trial court to instruct the jury adequately on the law of self-defense as it is applicable to the facts of the case. Such instructions must leave the question to be determined by the jury in the light of *all the facts and circumstances* in the case, rather than in the light of certain particular facts, whether relied on by the prosecution or by the accused, and must be an accurate and reasonably clear statement of the law of self-defense. The correctness of the instructions given is determined by the rules of law governing the right of self-defense as applied to the situation developed by the evidence.

Allison v. United States (1895), 160 U.S. 203, 16 S.Ct.252, 40 L.ed.395

Perovich v. United States (1907), 205 U.S.86, 27 S.Ct.456, 51 L.ed.722

Rowe v. United States (1896), 164 U.S.546, 17 S.Ct.172, 41 L.ed.547

State v. Cushing (Wash.,1896), 45 P.145, 53 Am.St.Rep.883

and *cf., Bird v. United States* (1902), 187 U.S. 118, 23 S.Ct.42, 47 L.ed.100

It has been held that where it applies, the right to stand one's ground should form an element of the in-

structions upon the necessity of a killing, and upon the law of self-defense.

People v. Hecker (Cal.,1895), 42 P.307, 313, 30 LRA 403

The rule which appears to prevail in the United States—and most assuredly applies in Alaska—is that where from the nature of the attack, an assailed person believes, on reasonable grounds, that he is in imminent danger of losing his life or of receiving great bodily harm from his assailant, he is not bound to retreat, but may stand his ground, and, if necessary for his own protecton, may arm himself and may take the life of his adversary.

Brown v. United States (1921), 256 U.S.335, 41 S.Ct.501, 65 L.ed.961

DeGroot v. United States (CCA 9th,1935), 78 F.2d 244, 5 Alaska Fed.785

Frank v. United States (CCA 9th,1930), 42 F 2d 623, 5 Alaska Fed.523

In the case of *Thompson v. United States* (1894), 155 U.S. 271, 15 S.Ct. 73, 39 L.ed. 146, the trial court had instructed the jury that if the accused thought that grave danger would come upon him by choosing a certain course of action and that if he was even temporarily away from it, he could avoid it, then it was his duty so to stay away from it and avoid it, the Supreme Court of the United States, in disapproving the instruction, said:

> "These instructions could, and naturally would, be understood by the jury as directing them that the accused lost the right of self-defense by returning home by the road that passed by the

> place where the deceased was, and that they should find that the fact that he had armed himself and returned by that road was evidence from which they should infer that he had gone off and armed himself and returned for the purpose of provoking a difficulty. Certainly the mere fact that the accused used the same road in returning that he had used in going from home would not warrant the inference that his return was with the purpose of provoking an affray, particularly as there was evidence that this road was the proper and convenient one. Nor did the fact that the defendant, in view of the threats that had been made against him, armed himself, justify the jury in inferring that this was with the purpose of attacking the deceased, and not of defending himself, especially in the view of the testimony that the purpose of the defendant in arming himself was for self-defense."
>
> *loc. cit.,* at p. 276

The present case is stronger than those cited above, because here the defendant not only sought to return to a place where he had a right to be, free from threats and molestation, but rather, he returned to a public place where he had just been feloniously assaulted and deprived of his property by force and arms; and thus he had the twofold privilege—as well as duty—to return and reclaim his property and, if possible, to disarm and arrest his assailant.[70]

> See defendant's proposed instructions Nos. 11 and 12 and statutes and cases cited in support thereof (Tr. 33-34).[71]

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[70]See: 66-5-37, ACLA 1949.

[71]These instructions were refused.

The evidence seems uncontradicted that the defendant, after having been feloniously assaulted with a deadly weapon by the deceased, retreated through the door, and—almost immediately thereafter—returned, having armed himself with a shotgun taken from his car, which was parked right outside of the door. In relating this specific portion of the incident, the defendant (appellant) testified as follows:

> "A. I backed away from the bar, (Perry) worked the slide (of the automatic pistol), and he said, 'now, get out of my bar,' I said, 'well, hey, I've got some money laying here on the bar.' I said, 'how about letting me pick my money up?' He said, 'don't pick up nothing. Just get out of my place.' So I said, 'well I want my money'. He said, 'get out of here.' Well, I was in no position to argue. I turned and left and walked out the front door * * * and my car was parked at an angle right outside that front door, in other words, where the entrance come(s) out, my car door would be * * * right at an angle, parked there * * *. I thought this guy must undoubtedly be nuts to approach a person like me that he doesn't know and try to shoot me and threaten me and take my money, so I started to get in the car, when I got in the car I saw the gun, the gun was lying on the back seat. I said, 'Well, Dean, Jack and all the men I know were back there. I am going to go back in there and if possible disarm him.' I grabbed the shotgun * * * and took it out of the back seat of the car and walked back up to the front door * * *. The door was locked. I kicked on the door with the toe of my shoe. * * * I heard somebody yell. When they yelled, the door opened—I could hear the bolt

slide on the door. The door opened. I carried the gun in at what I call trail arms. When I was in the service, you carry it down, trail arms. When I walked through the door, Mr. Perry was standing behind the bar with the gun pointing right at me. The first thing my natural reaction was, I reached up and just took the gun like this (indicating) and pulled the trigger. I didn't intend to kill the man. I had never killed anybody in my life before and I didn't intend to kill him. I have never had any intention to kill anybody."

"Q. What was your intention, Johnny House, when you walked through that front door?"

"A. I figured the man, as drunk as he was, would more than likely after I left there, the man would either lay the pistol down or put it back in his pocket or something and I intended to disarm him if he had the gun on him and at least turn him over to the law or at least turn him over to somebody, because the man undoubtedly couldn't have been in his right mind to do what he did. * * *"

Tr. 421-423

Under the authority of the cases cited above, and as a matter of common sense, it is obvious that the defendant had a right to have his theory of the case presented to the jury, as an alternative to that contended for by the prosecution. Thus, the jury should have been given the opportunity to find that, although the defendant may have picked up the shotgun and returned with the intention of shooting Perry, this intention was conditioned upon the revival or renewal of the attack upon defendant's life; that the

defendant did not intend to fire his gun, unless he were again attacked; but that, most assuredly, he was prepared to fire it, to defend his life.

Yet, under the instruction given, to the effect that

> "If you are convinced by the evidence beyond a reasonable doubt that defendant re-entered the Esquire Club with the intention of shooting the deceased, *you cannot find* that he shot in 'self-defense'. * * *" (Italics supplied)
>
> Tr. 49

the jury was compelled to conclude that if the defendant had *any* intention whatever of shooting, when he returned to the club, no matter how qualified or conditioned, it could not be considered self-defense. Obviously, most anywhere in the world, and most assuredly in Fairbanks, Alaska, when a man arms himself with a shotgun before an encounter with an armed adversary, he does so with the intention of shooting. Shooting, perhaps, only if necessary, but shooting, nevertheless. Thus, by the instruction given, the jury was compelled to reject the defendant's theory of self-defense and to reject the defendant's theory of lawful intent at the time of his reentry upon the premises.

As was stated by the court in the case of *Konda v. United States* (CCA 7th, 1908), 166 F. 91, 22 LRA (NS) 304:

> "* * * a defendant in a criminal case has the absolute right to require that the jury decide whether or not the evidence sustains each and every material allegation of the indictment. Ma-

terial allegations are allegations of fact. And each, as much as any other, enters into a verdict of guilty. If the judge may decide that one or another material allegation is proven, he may decide that all are proven, and so direct a verdict of guilty. * * * since the judge is without power to review and overturn a verdict of not guilty, there is no basis on which to claim the power to direct a verdict of guilty. * * * an accused person has the same right to have (the jury) pronounce upon the truth or falsity of each material averment in the indictment, if the evidence against him is clear and uncontradicted, as he unquestionably would have if it were doubtful and conflicting."

loc. cit., at p. 93

Here, the language of the court objected to by appellant, amounted, in effect, to a mandatory instruction to find against the defendant on the issue of self-defense and to find him guilty of at least some degree of culpable homicide, so long as the jury believed that he armed himself with the intent of shooting, whatever the circumstances which he might encounter upon his return. This instruction clearly invaded the province of the jury and deprived the defendant of his right to have a material, indeed a vital, allegation of the indictment—that pertaining to his intent and deliberate premeditation and malice—determined by the jury, instead of by the court. For this reason alone, he should be granted a new trial.

II. IN INSTRUCTING THE JURY PEREMPTORILY THAT THE ASSAULT WITH A DANGEROUS WEAPON MADE UPON THE DEFENDANT BY THE DECEASED "HAD ENDED", THE TRIAL COURT ERRONEOUSLY INVADED THE PROVINCE OF THE JURY AND PREJUDICIALLY PRECLUDED A FINDING, FAVORABLE TO THE DEFENDANT, THAT SUCH ASSAULT WAS CONTINUED, OR REVIVED, WHEN THE DEFENDANT RE-ENTERED THE PREMISES, THUS FORCING HIM TO SHOOT IN SELF-DEFENSE.

Instruction No. 12, discussed in the preceding paragraph, also contains the following ambiguous language which was brought to the attention of the trial court,[72] namely, "the assault with a dangerous weapon made upon the defendant by the deceased before the defendant left the Esquire Club had ended, * * *".

This part of the instruction even more directly than the one discussed in the preceding paragraph, involves an outright finding of fact and peremptory direction by the court to the jury, invading the latter's province, in that it precluded a finding that the felonious assault upon the appellant continued or was revived upon his re-entering of the premises. This portion of the instruction, when coupled with the one discussed previously, must have absolutely and finally defeated any chance the appellant might ever have had of persuading the jury that he acted in self-defense, because under the instructions of the court the jury was compelled to find that: (1) when the defendant returned to the Esquire Club his life was not subject to imminent danger from an assault with a deadly weapon by the deceased and (2) if, when re-entering carrying his shotgun, the defendant intended to use it, there could have been no self-defense. Since

[72]Tr. 481.

even under the defendant's version of the facts it was conceded that he re-entered the premises, armed, for the purpose of reclaiming his property and disarming his assailant; since it may be reasonably implied that when he took the shotgun he did so for the purpose of using it, if necessary, and since defendant's entire case was based upon his assertion of his right to self-defense against the second or renewed felonious assault upon him, this instruction came as close to a directed guilty verdict as it could, without actually using the words "under the facts of this case you cannot find that the defendant acted in self-defense and you must, therefore, find him guilty of some degree of homicide." Moreover, when coupled with instruction No. 15, also objected to—which is discussed in the next succeeding paragraph—the net effect of the total instructions was to direct the jury to find a verdict of "guilty of first degree murder".

In giving instructions to the jury in a homicide prosecution as in instructing the jury in any other criminal case, it is fundamental that the trial court may not invade the province of the jury or usurp its functions to find the facts of the case; it should not give instructions calculated to influence the jury in its decision as to the facts, or give an instruction which assumes as true the existence or non-existence of any material fact in issue, with respect to which there is some evidence or want of evidence in conflict.

Sec. 63-13-2, ACLA 1949

Dolan v. United States, (CCA 9th, 1903), 123 F.52, 2 Alaska Fed.105

Simpson v. United States, (CCA 9th, 1923), 289F. 188, 5 Alaska Fed.146, cert. den.263 US 707, 44 S.Ct. 35, 68 L.Ed.517, 5 Alaska Fed. 146

Frank v. United States, (*supra*)

Fosse v. United States, (CCA 9th, 1930), 44 F. 2d 915, 5 Alaska Fed.580

Freihage v. United States, (CCA 9th, 1932), 56 F.2d 127, 5 Alaska Fed.618

And see also: *Quercia v. United States,* (1933), 289 US 466, 53 S.Ct.698, 77 L.ed.1321

Thus it appears that in two different elements of the same objectionable instruction, each having a cumulative effect upon the other, the trial court in the present case invaded the province of the jury and deprived the defendant, on trial for murder, of his right to a determination of the material issues of the case, by a jury free from the fetters of judicially imposed restraints upon their deliberations.

In *Jones v. United States,* (CA 9th,1949), 175 F.2d 544, 12 Alaska 405, this Court pointed out the importance of assuring to a defendant in a murder trial a fair opportunity of having the issue of his guilt or innocence determined by the unfettered deliberations of a jury, no matter how shocking the crime or how strong the indications of the appellant's guilt. The principles there enunciated are even more strongly applicable where, as in the present case, both the question of guilt and that of the degree of such guilt, if any, depend upon the resolution of sharply conflicting testimony and the drawing of inferences with respect

to intent and the defendant's state of mind, based upon circumstantial evidence.

III. IN INSTRUCTING THE JURY THAT, IN FINDING THE DEFENDANT GUILTY OF MURDER IN THE FIRST DEGREE, IT WAS NOT REQUIRED THAT THERE HAVE ELAPSED ANY PRESCRIBED OR STANDARDIZED AMOUNT OF TIME BETWEEN THE FORMATION OF THE INTENT TO KILL AND THE ACT OF KILLING, BUT THAT "A DECISION MAY BE ARRIVED AT IN A SHORT PERIOD OF TIME", THE COURT OBLITERATED THE EFFECTIVE DISTINCTION BETWEEN MURDER IN THE FIRST DEGREE AND MURDER IN THE SECOND DEGREE AND THEREBY CONFUSED AND MISLED THE JURY. THIS CONSTITUTES PLAIN ERROR.

This is the precise point so strongly emphasized by this Court in *Jones v. United States,* (*supra*). Although the instruction in the present case does not contain all of the offensive language condemned in the *Jones* case *supra,* yet its net effect is to give the impression to the jury that even if they believe those witnesses and the defendant, who testified that the decision to shoot was not formed until after the accused had returned to the premises and was confronted by the deceased's weapon pointed at him, the thoughts which flashed through the defendant's mind during this split second were sufficient to constitute "premeditation" for the purpose of finding him guilty of first degree murder. Thus, under the particular facts of the present case, the somewhat less extreme instruction here used was bound to have the same prejudicial effect as did the more specific instruction under the circumstances which prevailed in the *Jones* case.

Although this point was not specifically objected to, it was brought to the trial court's attention as part of the motion for a new trial,[73] and in any event would be noticed by this Court under the "plain error" rule.

Jones v. United States, (*supra*).

IV. IN GIVING INSTRUCTION NO. 15, OVER OBJECTION, THE TRIAL COURT COMMITTED PREJUDICIAL ERROR IN CONFUSING AND MISLEADING THE JURY ON THE VITAL ELEMENT OF INTENT.

Instruction No. 15, given over objection,[74] was taken *verbatim* from the proposed instructions submitted by the prosecution. It read as follows:

> "Intent may be proved by circumstantial evidence. It rarely can be established by any other means. While witnesses may see and hear and thus be able to give direct evidence of what a defendant does or fails to do, there can be no eye-witness account of the state of mind with which the acts were done or omitted. But what a defendant does or fails to do may indicate intent or lack of intent to commit the offense charged.
>
> "It is reasonable to infer that a person ordinarily intends the natural and probable consequences of acts knowingly done or knowingly omitted. So unless the contrary appears from the evidence, the jury may draw the inference that the accused intended all the consequences which one stand-

[73]Tr. 67.

[74]Tr. 492; (see also Tr. 68).

ing in like circumstances and possessing like knowledge should reasonably have expected to result from any act knowingly done or knowingly omitted by the accused.

"In determining the issues as to intent, the jury are entitled to consider any statements made and acts done or omitted by the accused, and all facts and circumstances in evidence which may aid determination of state of mind."

The language just quoted seems clearly subject to two important vices: first, it does not accurately state the law, as will be shown more specifically below and, secondly, this instruction should not have been given at all, under the circumstances of the case, even assuming that it were in proper form.

It should first be noted that the trial court had earlier defined all of the elements of first and second degree murder in terms of "intent" or "intention". In instruction No. 4, the trial court stated that the word "purposely" means "intentionally"; premeditation was defined therein as conceiving a plan or method by which the defendant might undertake to achieve the "intended" result, malice was defined as the "intentional" doing of a wrongful act.[75] In Instruction No. 5 the court stated that "the intent to kill must be the result of deliberation", thus relating the element of deliberation to the question of "intent."[76]

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[75]Tr. 44-45.

[76]Tr. 45.

As to second degree murder, in instruction No. 8 the trial court indicated that the two elements of the crime were that the killing be done "purposely" and with "malice",[77] both of which elements had already been equated by the trial court with the concept of "intent" *(vide supra)*. In instruction No. 12, the trial court introduced yet another concept of "intent", namely, the "intention" with which the defendant re-entered the Esquire Club at the time of the shooting.[78]

Where criminal intent is an essential element of the crime, it must be proven like any other fact. In such cases, the law does not permit the judicial creation, by instruction or otherwise, of any presumptions or inferences which may be permitted to take the place of evidence. Appellant contends that the effect upon the minds of the jury, of the language used by the court in instruction No. 15, was to create a presumption, not warranted or supported by the facts of the case. This is because, in effect, taken with the other instructions just referred to, instruction No. 15 permitted the jury to presume or infer the existence of criminal intent, malice, premeditation, and deliberation, from the mere act of firing the gun at the deceased Perry, or from the mere act of re-entering the Esquire Club, while armed with a shotgun.

As authority for its proposed instruction, subsequenty accepted by the court, the government cited the case of *Morissette v. United States* (1952), 342 US

[77]Tr. 46-47.
[78]Tr. 49.

246, 72 S.Ct.240, 96 L.ed.288. Yet in that case the Supreme Court said:

> "It follows that the trial court may not withdraw or prejudge the issue (of intent) by instructing that the law raises a presumption of intent from such an act. * * * We think presumptive intent has no place in this case. A conclusive presumption which testimony could not overthrow would effectively eliminate intent as an ingredient of the offense. A presumption which would permit but not require the jury to assume intent from an isolated fact would prejudge a conclusion which the jury should reach of its own volition. A presumption which would permit the jury to make an assumption which all the evidence considered together does not logically establish would give to a proven fact an artificial and fictional effect. In either case, this presumption would conflict with the overriding presumption of innocence with which the law endows the accused and which extends to every element of the crime. Such incriminating presumptions are not to be improvised by the judiciary."
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> *loc. cit.,* at pp. 274-275

In the present case, both the defendant and a number of eye-witnesses had testified to all the facts surrounding the shooting. Under these circumstances, the instruction here objected to must have tended to force the jury to close its mind to this testimony and to draw inferences or make presumptions contrary to specific evidence bearing upon the issue of intent.

In *Vallas v. State* (Neb. 1939), 288 N.W. 818, the trial court gave the following instruction:

> "The law warrants the presumption, or inference, that a person intends the results or consequences to follow an act which he intentionally commits, which ordinarily do follow such acts."

This instruction was disapproved by the appellate court, which said:

> "Where the defendant is charged with assault with intent to kill or wound, and the details of the shooting and the attendant circumstances in reference thereto are testified to by eye-witnesses, instructions with reference to the presumption of law and intent should not be given, and, if given, constitute prejudicial error. The presumption of law does not take the place of such evidence or lessen or shift the burden of proof. In cases of this kind, intent is one of the principal elements of the offense charged, and instructions on the burden of proof in this respect are proper; likewise instructions, informing the jury as to matters to be taken into consideration in determining the intent * * *, would be proper, but instructions that overstate or overemphasize the intent, as heretofore explained, in view of the testimony of eye-witnesses to the shooting and to the attendant circumstances, are erroneous and prejudicial, as a matter of law."
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> *loc. cit.,* at p. 820

And see also:

State v. Wilson (Iowa, 1943), 11 N.W.2d 737, 754 and

Smith v. State (Miss., 1931), 137 So.96, 98

Again, in the case of *State v. Creighton,* (Mo., 1932), 52 S.W.2d 556, yet another court of last resort had this to say:

"Complaint is made of instruction No. 10, which said that one who intentionally uses upon another at some vital part a deadly weapon must be presumed to intend death, etc. Appellant maintains this instruction was unnecessary and improper, and tended to minimize his defense of self-defense. We think this criticism is just. * * * The facts attending the homicide were detailed by eye-witnesses, and the appellant did not deny its commission or claim it was unintentional. He invoked only the defense that it was done on either just or lawful provocation, and that he killed in self-defense, all of which predicate an intent to kill or inflict bodily harm. In these circumstances, no instructions on the presumption was called for."

loc. cit., at p. 565

In the case of *Tullos v. State,* (Miss., 1954), 75 So.2d 257, the trial court gave the following instruction:

"The court instructs the jury for the State that the deliberate use of a deadly weapon in any difficulty, not in necessary self-defense, is a fact from which malice may be inferred."

On appeal, this language was disapproved by the highest court of the state, which said:

"In this case, eight eye-witnesses, including the appellant, testified to the facts. This court has consistently held that where all the facts and circumstances surrounding a killing are fully disclosed by the evidence, it is error to instruct the jury that the deliberate use of a deadly weapon is evidence of malice or that the law presumes malice from such use. * * * The facts and cir-

cumstances surrounding the killing were fully disclosed in this case, therefore, for the error in granting the instruction complained of, the judgment of the court below must be reversed."

loc. cit., at p. 258

And see also:

People v. Snyder (Cal., 1939), 96 P.2d 986

In the present case, by charging the jury in instruction No. 15 that "there can be no eye-witness account of the state of mind with which the acts were done or omitted" and that "it is reasonable to infer that a person ordinarily intends the natural and probable consequences of facts knowingly done or knowingly omitted" and that "the jury may draw the inference that the accused intended all the consequences which one standing in like circumstances and possessing like knowledge should reasonably have expected to result from any act knowingly done or knowingly omitted by the accused", coupled with the language referred to above, in instructions Nos. 4, 5, 8 and 12, which equated "intent" with "premeditation" and thus with "malice", the trial court must have created the kind of confusion in the minds of the jury which is condemned by the cases just cited.

The instruction, moreover, was not limited to any particular crime *(e.g.,* first or second degree murder) with respect to the issue of "intent". Thus the jury was given no guide by which to apply the instruction. It must have been further confused, by the exclusion from among the items which the jury was told it could consider, of the testimony of the defendant himself.

By saying that "there can be no eye-witness account of the state of mind with which the acts were done or omitted" the jury was told in fact, that it could not consider the testimony of the defendant as to what his intent was. It must have left the jurors with the impression that they were permitted—and indeed required—to infer the existence of the criminal intent to kill—and of malice, premeditation and deliberation —from the mere act of firing the gun at the deceased, particularly in the light of the other instructions referred to above. Thus, this instruction, too, adds to the overwhelming compulsion of excluding any finding of self-defense, since it permits the jury to infer criminal intent from "an act knowingly done", although the defendant specifically admitted the shooting and plead provication and justification under the circumstances.

V. THE TRIAL COURT COMMITTED PREJUDICIAL ERROR IN REFUSING TO GIVE DEFENDANT'S REQUESTED INSTRUCTIONS NOS. 3, 4, 5, 6, 11, AND 12.

Defendant's proposed instruction No. 3,[79] would have permitted the jury to take into consideration the testimony of defendant and several witnesses, if believed, to the effect that defendant remained at the scene of the homicide instead of attempting to flee. Proposed instruction No. 4,[80] covered the effect of the threats made by the deceased against the defendant, his reputation for violence, as testified to by some of

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[79]Tr. 29.

[80]Tr. 29-30.

the witnesses, and his provocative conduct prior to homicide, upon the issue of self-defense. Proposed instruction No. 5,[81] bears upon the defendant's state of mind, as influenced by the deceased's prior conduct, at the time of the acts which defendant claims were done in defense of his person. Proposed instruction No. 6,[82] went to the heart of the issue of self-defense, by stating the law applicable to the defendant's right to return to the premises and to the issue of whether or not, under the circumstances of this case, defendant was legally compelled to retreat or could stand his ground and defend himself even to the point of taking the deceased's life. Proposed instruction No. 11,[83] dealt with the right (and duty) of the defendant to disarm and arrest the deceased, following the latter's assault upon the defendant with a deadly weapon, another major element of the defense of self-defense. Proposed instruction No. 12,[84] dealt with the right of the defendant to defend and reclaim his property, which had been forcibly taken from him by the deceased, under threats of violence or death and his further right of self-defense where, in so defending and reclaiming his property, he is once again confronted with danger to his life.

Statutes and cases were cited to each of the proposed instructions, which were rejected by the court. It does not appear from the record that these instruc-

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[81]Tr. 30.
[82]Tr. 30-31.
[83]Tr. 33.
[84]Tr. 34.

tions, which correctly stated the law and were applicable to the facts of the case, and which dealt with material points at issue, were adequately covered, or at all, by the instructions which were eventually given by the court. The refusal to give instructions applicable to the issues which are not covered by other instructions given is a ground for reversal, where such refusal is prejudicial.

Burton v. United States (1905), 196 US 283, 25 S.Ct.243, 39 L.ed.482

Pinkerton v. United States, (CCA 5th,1944), 145 F.2d 252

Calderon v. United States, (CCA 5th,1922), 279 F. 556

Wright v. United States, (CA DC, 1957), 250 F.2d 4

Johnson v. United States, (CA DC, 1957), 244 F.2d 781

United States v. Chicago Express, Inc., (CA 7th,1956), 235 F.2d 785

As has been shown above, the instructions given in the present case were neither adequate nor correct. Refusal to grant pertinent instructions requested by the defense thus compounded the prejudicial effect of the charge and, in a case charging a crime of the highest order of magnitude, it should be more than ample grounds for a new trial.

VI. HAVING BEEN FULLY APPRISED OF THE ERROR CONTAINED IN ITS INSTRUCTIONS TO THE JURY, THE TRIAL COURT SHOULD HAVE GRANTED A NEW TRIAL AND ITS FAILURE TO DO SO, UPON A PROPER MOTION AGAIN BRINGING TO ITS ATTENTION FULLY THE PREJUDICIAL EFFECT OF THE ERRONEOUS INSTRUCTIONS, CONSTITUTED AN ABUSE OF DISCRETION AND REVERSIBLE ERROR.

The insufficiencies of the instructions were more than fully discussed and brought to the attention of the trial court, both before and after the giving of the charge.[85] Moreover, after the jury returned with, what appellant contends was in the light of the limitations placed upon the jury's deliberations by the court's instructions, an inevitable verdict, a motion for a new trial was filed, which fully covered the issues here discussed[86] and the points of law were amply briefed and argued.[87] Yet, nevertheless, the trial court saw fit to deny the motion.

The granting or refusal of a new trial, while generally speaking a matter of discretion, is nevertheless subject to review where the discretion is abused.

Georgia-Pacific Corp. v. United States (CA 5th,1959), 264 F.2d 161

Moreover, the granting or refusal of a new trial on account of alleged errors of law occurring in the course of the trial are not matters of discretion, and are fully subject to review by the appellate court. This is particularly true where a party has been

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[85]N.B. the trial court's remark: "I want to comment, by the way, that I enjoy this. It is not often we have the opportunity to discuss proposed instructions at such length." Tr. 484; and see, generally, Tr. 481-494.

[86]Tr. 67-69.

[87]Tr. 70-72, 77-78.

prejudiced—and the probable result of a trial changed —by the giving of erroneous instructions to which proper exception was taken.

Smith v. United States (1896), 161 US 85, 16 S.Ct.483, 40 L.ed.626

And see:

2 Am.Jur. "Appeal and Error", Sec. 101, at pp. 911-912 and cases there cited.

In the present case, the verdict of the jury confirmed the apprehensions of the defendant with respect to the damaging effect of the instructions objected to. The trial court should have granted a new trial. Failing in this, a new trial should be granted by this Court.

VII. THE ACTIONS OF THE TRIAL COURT IN INVADING, BY ITS INSTRUCTIONS, THE PROVINCE OF THE JURY AND UNDULY RESTRICTING THE EXERCISE OF THE JURY'S FACT-FINDING FUNCTIONS ON THE ALL-IMPORTANT ISSUES OF INTENT AND SELF-DEFENSE, DEPRIVED THE ACCUSED OF HIS CONSTITUTIONAL RIGHTS TO AN IMPARTIAL JURY TRIAL, AS GUARANTEED TO HIM BY ARTICLE III OF THE CONSTITUTION OF THE UNITED STATES AND THE FIFTH AND SIXTH AMENDMENTS THERETO.

Article III, Section 2, Clause 3 of the Constitution of the United States provides that "The Trial of all Crimes except in Cases of Impeachment, shall be by Jury * * *." This guarantee extends to the incorporated territories of the United States.

Rassmussen v. United States (Alaska, 1905), 197 US 518, 25 S.Ct.514, 49 L.ed.862

Thompson v. Utah (1898), 170 US 347, 18 S.Ct. 620, 42 L.ed.1061

The rights of the accused guaranteed by this clause are specifically enumerated and implemented in the Sixth Amendment to the Constitution.

Callan v. Wilson (1888), 127 US 549, 8 S.Ct. 1301, 32 L.ed.223

Moreover, the "due process" clause of the Fifth Amendment also covers the guarantee of a fair and impartial trial by jury and failure to strictly observe these constitutional safeguards renders the trial and conviction for a criminal offense illegal and void.

Baker v. Hudspeth (CCA 10th,1942), 129 F.2d 779, cert.den. 317 US 681, 63 S.Ct.201, 87 L.ed.546.

Thus, for example, it has been held under the provisions of the Sixth Amendment, that a trial court in a criminal case tried by a jury is without the right to express an opinion on the ultimate issue to be decided by the jury, except in the particular situation wherein the facts are not in dispute. In a criminal case, the expression of an opinion by the trial judge on the merits and on the issue which the jury is to determine is an abridgment of the right to a speedy and public trial by an impartial jury, guaranteed by this Amendment.

United States v. Meltzer (CCA 7th,1938), 100 F.2d 739

The bars which guard the right to a "fair trial" such as is guaranteed by the Constitution, include court procedure, rules of evidence and *proper instructions to the jury,* and those bars must not be lowered.

Miller v. United States (CCA 10th,1941), 120 F.2d 968

Thus it has been held that the jury must be allowed to deliberate on *all* issues. There cannot be a directed verdict in a criminal case, in whole or in part.

United States v. Taylor (CCA 10th,1882), 11 F.470

Hence it follows, that *all* issues of fact are for the jury and instructions which purport to resolve any such issue are prejudicial.

Brooks v. United States (CA 5th,1957), 240 F.2d 905

In the present case, the trial court, by its instructions to the jury—and by its refusal to give those instructions which were requested by the defendant—effectively took from the jury the issues of self-defense and the existence or absence of the intent to kill. It was, in effect, as if the court had directed a verdict on these issues. Having been deprived of their liberty to conclude that there was self-defense, the jury was compelled to find the defendant guilty of some degree of homicide. And having been peremptorily instructed with respect to the issue of intent, as well as having been led to confuse "intent" with "premeditation" and "malice", the jury was inevitably led to find the defendant guilty of murder in the first degree.

Thus the learned trial judge, innocently and with good intentions,[88] but with devastating effect upon the rights of the accused nevertheless, compelled the result of the trial below and deprived the appellant as

[88]The record shows that, on the whole, the trial was conducted with exemplary fairness and impartiality.

effectively of his right to a jury trial as if the court had attempted to direct a guilty verdict in so many words.

As was recently said so well in *United States v. Ogull* (DC NY,1957), 149 F.Supp. 272:

> "What is sacrosanct in a jury trial, is the right of the defendant to have the jury deliberate and apply the law free from judicial trammel."

The record in the present case indicates that the defendant here is to be deprived of his liberty for the balance of his natural life, as a result of a trial which violated this sacred right and which deprived him of a basic guarantee, vouchsafed him by the Constitution of the United States. Accordingly, the judgment below should be reversed and a new trial granted.

CONCLUSION[89]

The appellant in the present case, stands condemned of the most serious crime known to civilized society, that of deliberate and premeditated murder. He is under sentence of imprisonment for the rest of his natural life, the extreme penalty permissible under the laws of Alaska. This has come as the result of a jury trial, fairly and impartially conducted on the whole, which found arrayed against each other in irreconcilable conflict, two groups of eye-witnesses, present at the killing. One, a group of men friendly to the deceased, the other, a group of men whose testimony supports that given, in great and specific detail,

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[89]Because of the gravity of the cause, appellant begs the Court's indulgence of a brief recapitulation at this point.

by the appellant himself. Despite this sharp conflict, large areas of agreement exist and, in the final analysis the issues which had to be resolved by the triers of the facts, sharpened into two disputed points:

(1) Whether the appellant, in arming himself and returning to the bar where, a few fleeting moments before, he had been feloniously assaulted—with a deadly weapon—by the deceased, he was motivated by a premeditated intent to kill and activated by malice and evil purpose, or whether he returned for the lawful ends of reclaiming his property forcibly wrested from him and disarming and arresting his assailant; and

(2) whether or not upon his return to the Esquire Club he was once again subjected to an assault which threatened his life and, reacting instinctively, cut down his assailant in justifiable self-defense.

Clearly, there was persuasive evidence to support either theory. In favor of the prosecution's case was the testimony of appellant's alleged threats against the deceased at the time the latter first assaulted him; the manner in which he is said to have forced his way into the bar and the claim (challenged, however, by the physical fact of the presence of the deceased's automatic weapon on the tavern floor immediately following the shooting) that at the time appellant reentered the bar, the deceased had returned his pistol to his pocket and was trying to pull it out when he was shot down.

Against this stands the equally emphatic testimony of the appellant that, after having been made the

victim of an unprovoked felonious assault upon his life and forcibly deprived of his property, he returned to a public place, where he had a right to be, with the intention of reclaiming his money and disarming the aggressor; that he entered carrying his gun pointed down and did not raise it and fire until after he was once again confronted with the deceased's lethal weapon, which he knew to be loaded and which was aimed at appellant at point blank range. Moreover, there is offered evidence (albeit disputed) to the effect that appellant, instead of fleeing the scene of his supposed crime, voluntarily laid down his weapon and drove to the nearest place which had a telephone, whence he called the police and returned, submitting himself meekly to arrest.

Faced with this conflicting evidence, no one can predict how the jury might have resolved these conflicts, if left to its own devices. It might have found, for instance, that while the appellant armed himself with the intention of shooting the deceased upon his return, this was done in anticipation of the existing and continued threat to appellant's life and in defense of his property or in the pursuit of his statutory duty (to apprehend the felon who had just assaulted appellant and his friend), or for both of these reasons. The jury might have found that, enraged by the initial assault, the taking of his property and the attempt to lock him out, appellant returned to cut down the deceased in a burst of passion.

Unfortunately, the jury here was deprived of its constitutionally guaranteed freedom to deliberate upon

all the facts and to resolve the conflicts of evidence before it. *First,* the jury was told peremptorily that the assault upon appellant's life had ended when he returned to the bar; without being cautioned that it was free to find that such assault was renewed or revived, or that a new assault took place thereafter, which might have entitled the appellant to fire in self-defense. *Secondly,* the jury was charged that so long as appellant intended to shoot the deceased, when he armed himself and returned to the club, it could not find that he acted in self-defense; without being cautioned that there could still be self-defense if such intent to shoot was not unqualified, but depended upon whether or not the threat to appellant's life was continued or renewed, and thus appellant had armed himself with the intention of protecting himself, his friends and his property, rather than to murder the deceased.

Having thus been deprived of his shield of self-defense, the appellant was dealt the *coup de grâce* by the insidious combination of several confusing instructions, pertaining to intent, and equating intent with intention, premeditation and malice, thus inevitably misleading the jury into the grave error of concluding that the mere act of returning with the intention to shoot, constituted homicide with malice and premeditation. To top it all off, there was given an improper and prejudicial instruction on the abstract issue that a person may be presumed to intend the natural consequences of his "act", an instruction which has been universally condemned in all cases

where the facts and circumstances surrounding a shooting or killing have been detailed by eye-witnesses and where the intentional character of the act is admitted by the traverse of self-defense. From this it necessarily resulted that the jury must have concluded that, even if there was no evidence at all that the appellant did indeed intend to shoot the deceased, when appellant armed himself and returned to the Esquire Club, nevertheless such intention should be *presumed* from the mere fact that he did so arm himselm and shoot the deceased.

The net result of this unfortunate chain reaction of confusing and ambiguous instructions, was to take from the jury the two crucial issues in controversy referred to above—thus virtually directing a verdict of guilty, and indeed of guilt in the highest possible degree. By thus taking from the defendant his constitutionally guaranteed right to an untrammeled trial by an impartial jury, the appellant is to be deprived of his liberty for the balance of his natural life, in clear violation of specific guarantees contained in the Constitution and the Bill of Rights.

Accordingly, appellant earnestly contends that the judgment of the trial court below should be reversed and the case remanded with instructions to grant him a speedy new trial by jury.

Dated, February 11, 1960.

Respectfully submitted,
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